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The Music Business and the Sherman Act: An Analysis of the Economic Realities of Blanket Licensing

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THE MUSIC BUSINESS AND THE SHERMAN ACT: AN ANALYSIS OF THE "ECONOMIC REALITIES" OF BLANKET LICENSING

by Lionel S. Sobel*

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I. INTRODUCTION

A. *Origins of ASCAP*

The American Society of Composers, Authors and Publishers (ASCAP) traces its origins back 70 years to a Times Square restaurant named Shanley's Cafe. According to legend, composer Victor Herbert walked into Shanley's one autumn evening in 1913 and heard a band playing music from his then-current musical "Sweethearts."¹ Though copyright owners had had the exclusive right to publicly perform their music for profit since 1897,² Shanley's never sought, much less paid for,

1. Allen, *The Battle of Tin Pan Alley*, 181 Harper's Mag. 514, 516 (1940).

2. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (codified at 17 U.S.C. § 106(4)).

Herbert's permission to perform his works. A usually genial fellow, Herbert's Irish temper boiled over. "My God!" he reportedly said. "If they'll do this to my stuff when I can afford expensive lawyers, what aren't they doing to the others? We've got to look after the b'ys."³

Herbert immediately realized that in order to "look after the b'ys," songwriters would have to be organized; and he and his lawyer, Nathan Burkan, did so. ASCAP's first official meeting took place in March of 1914 in a New York City restaurant named Luchow's. Those in attendance dedicated the infant organization to the prevention of unauthorized performances of copyrighted music — and the first case they supported was Victor Herbert's own against Shanley's Cafe.⁴ Herbert won. In 1917, the United States Supreme Court rejected Shanley's contention that because he did not charge for admission, and because the music played in his cafe was "only incidental" to his restaurant business, Herbert's music had not been performed "for profit." In a decision by Justice Oliver Wendell Holmes, the Court ruled that music performed in restaurants is performed "for profit," even if money is not taken at the door and the music is not charged for separately from the food and drink.⁵

With this important victory under its belt, ASCAP proceeded to fulfill its charter by bringing scores of infringement suits against those who failed to heed its warnings. ASCAP won all of those cases, but it also learned the first economic reality of copyright enforcement: infringement suits frequently do not pay their own way. Until 1921, ASCAP's expenses exceeded its collections even though its officers worked for free. Indeed, Victor Herbert may have thought that he had "expensive lawyers," but Nathan Burkan himself did not charge ASCAP for his legal services during those early years.⁶

ASCAP's enforcement activities have never been criticized. The Justice Department and the courts always have recognized that it would be impossible for individual composers and music publishers to police the public performance of their works.⁷ Thus, in this regard,

3. *5,000,000 Songs*, 7 *Fortune Mag.* 27, 28 (1933).

4. *Id.*; Allen, *supra* note 1, at 516.

5. *Herbert v. Shanley Co.*, 242 U.S. 591, 594-95 (1917).

6. *5,000,000 Songs*, *supra* note 3, at 29; Allen, *supra* note 1, at 516.

7. See, for example, the Complaint filed by the Justice Department in *United States (US) v. ASCAP*, quoted in Finkelstein, *The Composer and the Public Interest — Regulation of Performing Rights Societies*, 19 *Law & Contemp. Prob.* 275, 284 (1954); the Amicus Curiae Brief of the Solicitor General to the Supreme Court in *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968), quoted in *Columbia Broadcasting System, Inc. (CBS) v. ASCAP*, 337 F. Supp. 394, 398 (S.D.N.Y. 1972); Alden-

there seems to be a consensus that ASCAP performs an essential service.

ASCAP did not confine itself to anti-infringement activities, however. It also set itself up as a copyright "clearinghouse." On behalf of its members, ASCAP issued licenses to all who wished to perform their music. In those early days, music users were generally theaters, dance halls, taverns and hotels—the sorts of users that were unlikely to know in advance precisely which tunes they would be playing. As a result, ASCAP conceived and issued a license that authorized each user to perform any or all of the compositions in the ASCAP repertory, as many or as few times as the user chose, in exchange for a single, annual license fee. This form of license was and still is known as a "blanket license."⁸

B. Blanket Licenses

1. Early Blanket Licenses

The wisdom of ASCAP's "clearinghouse" also has been acknowledged. It was, at least in the beginning, essential, because when ASCAP was formed, "those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users. . . ."⁹ Likewise, "[o]n the other side of the coin, those who wished to perform compositions without infringing the copyright were, as a practical matter, unable to obtain licenses from the owners of the works they wished to perform."¹⁰

Although the central clearinghouse nature of ASCAP's licensing activities has never been questioned, certain features of its early blanket licenses were. In order to permit ASCAP to function "most effectively,"¹¹ its members assigned to ASCAP the nondramatic performing rights to their music. In the beginning—and for many years—these assignments were exclusive. This meant that anyone wanting a license for those rights had to obtain it from ASCAP alone. Not even a song's own composer or publisher could issue a performance license. In addition, for many years, ASCAP's blanket licenses were available on an

Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 891 (S.D.N.Y. 1948), *relief*, 80 F. Supp. 900 (S.D.N.Y. 1948); and Broadcast Music, Inc. (BMI) v. CBS, 441 U.S. 1, 5 (1979).

8. CBS v. ASCAP, 400 F. Supp. 737, 741-42 (S.D.N.Y. 1975).

9. BMI v. CBS, *supra* note 7, at 4-5.

10. CBS v. ASCAP, *supra* note 8, at 741.

11. Alden-Rochelle, Inc. v. ASCAP, *supra* note 7, at 891.

annual basis only; ASCAP would license nothing less.¹²

Prior to the advent of radio, these restrictive features of the blanket license were of little if any practical consequence. By the 1930s however, relations between ASCAP and the radio industry had soured. The issue was money, and the dispute focused on the amount radio stations had to pay for performance licenses. Since ASCAP controlled the rights to some 80% of the music radio broadcast, the specter of alleged antitrust violations appeared—and has remained to haunt ASCAP ever since.

In 1934, the Department of Justice filed suit against ASCAP alleging that it dominated the radio industry. The case never came to a head, however. After two weeks of trial in 1935, the Government asked for an adjournment, and the case was never resumed.¹³ Perhaps it was left dormant because in that year, ASCAP and the radio industry signed a new five-year licensing agreement—one that called for a substantial increase in fees, but one that apparently satisfied radio nevertheless, for then.¹⁴

When the time came for the ASCAP-radio industry agreement to be renegotiated, ASCAP served notice that it intended to ask for still higher fees. In response, in 1939, the radio industry organized its own performing rights society, Broadcast Music, Inc. (BMI).¹⁵ Though a new agreement with ASCAP was reached, BMI survived and grew. Today, BMI ranks beside ASCAP as one of the two most significant music licensing organizations in this country and the world.¹⁶

In retrospect, it is apparent that what had upset radio in 1939 was the size of the licensing fee ASCAP had proposed and not its methods of operation nor even its blanket license. For when BMI went into business in 1940, it too acquired exclusive licensing rights,¹⁷ and it too issued annual blanket licenses to the very radio stations that were its owners.¹⁸

BMI was less than two years old when in 1941 the Justice Department sued it along with ASCAP alleging that the blanket licenses used by both illegally restrained trade in violation of the antitrust laws.

12. *CBS v. ASCAP*, 562 F.2d 130, 133 (2d Cir. 1977); Cirace, *CBS v. ASCAP: An Economic Analysis of a Political Problem*, 47 Fordham L. Rev. 277, 278 n.16 (1978).

13. *CBS v. ASCAP*, *supra* note 12, at 133.

14. Cirace, *supra* note 12, at 287.

15. *Id.* at 288; *CBS v. ASCAP*, *supra* note 8, at 742; Allen, *supra* note 1, at 514-15.

16. *BMI v. Moor-Law, Inc.*, 527 F. Supp. 758, 760 (D. Del. 1981), *aff'd. without published opinion*, 691 F.2d 490 (3d Cir. 1982).

17. *US v. BMI*, 1940-1943 Trade Cas. ¶ 56,096 at 382 (S.D.N.Y. 1941).

18. *CBS v. ASCAP*, *supra* note 8, at 742.

Both organizations quickly agreed to Consent Decrees.¹⁹

2. The Consent Decrees

The 1941 Consent Decrees prohibited ASCAP and BMI from acquiring or asserting exclusive licensing rights.²⁰ Thus, composers and publishers were given the right to issue licenses themselves in competition with one another and with ASCAP and BMI. In addition, the Decrees required both organizations to offer "per program" licenses as well as annual licenses to broadcasters, and per program and per composition licenses to nonbroadcasters.²¹ (Per program licenses authorize music users to perform any or all of the compositions in the ASCAP and BMI repertories in exchange for a fee based on revenues earned by the particular program in which a song is used. Thus a per program license is a form of "blanket license."²² On the other hand, per composition licenses, which are sometimes referred to as "per use" licenses, are not blanket licenses; they authorize the use of a particular, identified composition only.²³)

Both Consent Decrees have been amended: ASCAP's in 1950²⁴ and BMI's in 1966.²⁵ And both organizations continue to operate today under the terms of those amended decrees.²⁶

3. Current Blanket Licenses

Today, ASCAP and BMI issue licenses to a wide variety of music users. In addition to radio and television stations and networks, licenses are issued to such businesses as concert halls, hotels, retail stores, colleges, dance studios, bars, nightclubs and restaurants. The precise form of the license issued depends on the nature of the music user's business, though within each industry the license is uniform.²⁷

Some license fees are very modest. For example, BMI's license fee for bars, nightclubs and restaurants that use live music is based on the amount of money the licensee spends each year hiring musicians.

19. *US v. BMI*, *supra* note 17; *US v. ASCAP*, 1940-1943 Trade Cas. ¶ 56,104 (S.D.N.Y. 1941).

20. *US v. BMI*, *supra* note 17, at 382; *US v. ASCAP*, *supra* note 19, at 403.

21. *US v. BMI*, *supra* note 17, at 383; *US v. ASCAP*, *supra* note 19, at 404.

22. *CBS v. ASCAP*, *supra* note 7, at 396; *CBS v. ASCAP*, *supra* note 12, at 133; *BMI v. CBS*, *supra* note 7, at 27 n.8 (Stevens, J., dissenting).

23. *See, e.g.*, *US v. BMI*, *supra* note 17, at 383; and *CBS v. ASCAP*, *supra* note 12, at 134 n.9.

24. *US v. ASCAP*, 1950 Trade Cas. ¶ 62,595 (S.D.N.Y. 1950).

25. *US v. BMI*, 1966 Trade Cas. ¶ 71,941 (S.D.N.Y. 1966).

26. *BMI v. CBS*, *supra* note 7, at 11, 12 n.20.

27. *BMI v. Moor-Law, Inc.*, *supra* note 16, at 760.

Those who spend less than \$5,000 a year for musicians are charged only \$75 for an annual BMI license, while those who spend \$450,000 or more are charged \$1,700. Most music users need an ASCAP license as well. ASCAP's license fee formula includes the price of drinks served, seating capacity and other variables. And ASCAP's fee is generally somewhat more expensive, because the ASCAP repertory is substantially larger than BMI's.²⁸

BMI's concert hall license fee is based on concert revenues. Its radio license fee is geared to advertising revenues.²⁹ For many years, its network television license fee was based on net receipts from program sponsors,³⁰ and its individual television station license was based on station revenues.³¹

However, neither BMI's nor ASCAP's license fees vary according to the quality, quantity or popularity of the music actually performed.³² This clearly has been the rub for those who object to blanket licensing.

C. *Post-Consent Decree Challenges to Blanket Licensing*

Although the Consent Decrees imposed "tight restrictions"³³ on ASCAP and BMI, several of their customers have remained dissatisfied. As a result, there have been several cases in which music users have alleged that despite ASCAP's and BMI's compliance with the terms of the Decrees, blanket licensing continues to violate the antitrust laws.

In *K-91, Inc. v. Gershwin Publishing Corp.*,³⁴ decided in 1967, a radio station asserted that ASCAP and its members had conspired to fix prices and monopolize trade in violation of the Sherman Act. The Ninth Circuit Court of Appeals disagreed. It noted that ever since the 1950 amendment to the ASCAP Consent Decree, individual composers and publishers have had the right to issue individual licenses for the performance of their own songs. Because ASCAP's licensing authority is not exclusive, the court ruled that ASCAP's offer of a blanket license did not violate the antitrust laws. The court also noted that if the radio station wanted a blanket license but was dissatisfied with the fee demanded by ASCAP, the station had the right, under the Consent De-

28. *Id.* at 760-61.

29. *Id.* at 761.

30. *CBS v. ASCAP*, *supra* note 8, at 743.

31. *Buffalo Broadcasting Company, Inc. v. ASCAP*, 546 F. Supp. 274, 282 (S.D.N.Y. 1982), *appeal pending*.

32. *BMI v. CBS*, *supra* note 7, at 31 (Stevens, J., dissenting).

33. *Id.* at 11.

34. 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968).

cree, to apply to the Federal District Court in New York City to fix a reasonable fee. For this reason, the court explained, "ASCAP cannot be accused of fixing prices because . . . it is not the price fixing authority."³⁵

In 1979, in *Broadcast Music, Inc. v. Grant's Cabin, Inc.*,³⁶ a nightclub owner alleged that BMI and its affiliates combined and conspired to fix prices. A Federal District Court in Missouri ruled otherwise. Citing *K-91, Inc. v. Gershwin*, the court held that BMI's blanket license does not violate the antitrust laws because individual licenses are available from composers and publishers. Furthermore, the court said that blanket licenses issued by ASCAP and BMI "are justifiable as a market necessity for . . . licensing . . . restaurants, night clubs, skating rinks and radio shows," and because they are a market necessity for this purpose, they do "not violate the antitrust laws."³⁷

In 1981, in *Broadcast Music, Inc. v. Moor-Law, Inc.*,³⁸ another nightclub owner alleged that BMI's use of blanket licenses restrained and monopolized trade in violation of the antitrust laws. A Federal District Court in Delaware ruled to the contrary in a lengthy decision which gave careful consideration to economic principles as well as purely legal doctrine.

In 1982, in *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*,³⁹ the Seventh Circuit Court of Appeals held that the blanket license issued by a religious music publisher to Chicago's Catholic parishes does not violate the antitrust laws.

Finally, in *CBS v. ASCAP*,⁴⁰ the Second Circuit Court of Appeals held that the blanket licenses ASCAP and BMI issue to the CBS network do not restrain trade, because the network has a fully available alternative: it can obtain performance licenses directly from the composers and publishers of the music it wishes to broadcast. The Second Circuit so ruled on remand from the United States Supreme Court which earlier had held that blanket licensing of television networks is not illegal *per se* even though "the necessity for and advantages of a blanket license for those users may be far less obvious than is the case

35. *Id.* at 4.

36. 1978-1981 CCH Copyright Law Decisions ¶ 25,074, 204 USPQ 633 (E.D. Mo. 1979).

37. 1978-1981 CCH Copyright Law Decisions at 15,447; 204 USPQ at 634.

38. 527 F. Supp. 758 (D. Del. 1981), *aff'd without published opinion*, 691 F.2d 490 (3d Cir. 1982).

39. CCH Copyright Law Reports ¶ 25,376 (7th Cir. 1982), *cert. denied*, 74 L.Ed.2d 113 (1982).

40. 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981).

when potential users are individual television . . . stations."⁴¹

Given this string of cases in which the legality of blanket licensing has been upheld in a wide variety of settings and circumstances, and given the Supreme Court's observation in the *CBS* case that "the necessity for and advantages of a blanket license for [television networks] may be far less obvious than is the case when the potential users are individual television . . . stations," ASCAP and BMI were no doubt shocked when in August of 1982, a Federal District Court in New York City ruled that they did violate the antitrust laws when they issued blanket licenses to individual, local television stations — something ASCAP and BMI have been doing, under and pursuant to the Consent Decrees, for more than 40 years. The case in which this remarkable decision was rendered is *Buffalo Broadcasting v. ASCAP*.⁴²

The thesis of this article is that *Buffalo Broadcasting* was wrongly decided, and that it was wrongly decided for two reasons: first, because the court used economic theory, rather than legal doctrine, to decide the case; and second, because the court erred in its use of that economic theory. Had the court used economic theory properly, it would have concluded that blanket licensing is perfectly consistent with the antitrust laws. Alternatively, had the court simply applied *stare decisis* and ruled on the basis of legal doctrine, it would have held in favor of ASCAP and BMI as well.

It is the further thesis of this article that the economics of blanket licensing are such that blanket licensing should be permissible under the antitrust laws even if the alternative of obtaining licenses directly from individual composers and publishers were not available as a practical matter.

In order to develop these theses, it is necessary to begin with a description of the process by which music is licensed for television broadcast and some background on television broadcasters' dissatisfaction with blanket licensing.

II. LICENSING MUSIC FOR TELEVISION BROADCAST

A. *Uses of Music in Television Programs*

Television programs use music in three ways. In some programs, such as variety shows, music is the *feature* or main focus of viewer attention. Other programs, including comedy and dramatic series, use *theme* music to introduce and close the show, and *background* music to

41. *BMI v. CBS*, *supra* note 7, at 21.

42. 546 F. Supp. 274 (S.D.N.Y. 1982), *appeal pending*.

complement on-screen action.⁴³ Whether music is feature, theme or background has no legal significance in itself; but it does indicate the manner in which the music probably was obtained by the program's producer.

Television producers obtain music in two ways. Theme and background music almost always is composed especially for particular programs by professional composers hired for that very purpose. Feature music, on the other hand, usually is existing music that was composed for some other principal purpose such as concert performances, recordings, motion pictures or musical plays.⁴⁴

Even the manner in which music is obtained by television producers has no legal significance in itself. It does, however, affect whether broadcasters can function without blanket licenses from ASCAP and BMI. To understand why, it is first necessary to understand the nature of composers' rights under the Copyright Act.

B. Composers' Rights Under the Copyright Act

A copyright is a bundle of several separate and conceptually distinct rights.⁴⁵ Two of these rights are necessary for the production and broadcast of virtually all television programming: the right to *record* music on program soundtracks,⁴⁶ and the right to publicly *perform* music for profit.⁴⁷

1. The Synchronization Right

The right to record music on a television program soundtrack is known as the "synchronization right," because in recording the music on the soundtrack, it is synchronized with the on-screen action.⁴⁸ Producers obtain "synch" rights directly from the owner of the copyright to the music to be used. If the music already exists, the copyright usually is owned by a music publisher (which acquired it by assignment from the composer); and the producer deals directly with the publisher to obtain a synch license. Most synch rights transactions begin with a

43. *CBS v. ASCAP*, *supra* note 8, at 755.

44. *Id.* at 756.

45. 17 U.S.C. § 106; *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843, 847 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons v. Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949).

46. 17 U.S.C. § 106(1); "live" performances which are never to be rerun (and certain "one-run" taped programs which by industry custom are considered "live") do not require recording licenses. *CBS v. ASCAP*, *supra* note 8, at 759.

47. 17 U.S.C. § 106(4).

48. *CBS v. ASCAP*, *supra* note 8, at 743, 759.

telephone call from the producer (or its agent) to the Harry Fox Agency, Inc., which represents some 3,500 music publishers including almost all of the major publishers. The Fox Agency usually has fee instructions from its publisher-clients, or is familiar with their fees from prior transactions, and thus frequently is able to give producers license fee quotes over the phone. The entire licensing transaction often takes no longer than two or three days. In fact, the Fox Agency issues several thousand synch licenses each year with a basic staff of only two employees.⁴⁹

If the music to be used is written especially for a television program by a composer hired by the producer, the copyright to that music belongs (at least initially) to the producer itself.⁵⁰ For this reason, the producer acquires the synch right to such music simply by hiring the composer to write it.

2. The Performance Right

The right to broadcast music for profit is known as the "performance right."⁵¹ Until the *Buffalo Broadcasting* decision, performance rights were obtained by broadcasters (not by producers).⁵² Since the Consent Decrees were entered in 1950, broadcasters have had the right to obtain performance licenses directly from copyright owners⁵³ (which are usually music publishers). Nevertheless, as a matter of historic fact, broadcasters have obtained performance rights from ASCAP and BMI which serve as the publishers' non-exclusive agents for issuing public performance licenses.⁵⁴

3. The "Splitting" of Synchronization and Performance Rights

In *Buffalo Broadcasting*, the court described the acquisition of synch rights by producers and the acquisition of performance rights by broadcasters as a "split."⁵⁵ It appears that the unstated implication of the "splitting" accusation is that composers and music publishers have managed to charge broadcasters twice for what really is a single commodity. In fact, it is not conceptually accurate to describe the method

49. *Id.* at 759-60.

50. 17 U.S.C. § 201(a), (b).

51. *CBS v. ASCAP*, *supra* note 8, at 743.

52. *Id.*

53. See footnote 20, *supra*, and accompanying text.

54. *CBS v. ASCAP*, *supra* note 8, at 743; *Buffalo Broadcasting v. ASCAP*, *supra* note 31, at 281-82.

55. *Buffalo Broadcasting v. ASCAP*, *supra* note 31, at 283.

by which music is licensed for television use as a "split." The reason for the method is rooted in history and is conceptually proper.

When movies were silent, theaters employed pianists or orchestras to provide musical accompaniment to the films being shown. Thus, in those days, movie theaters themselves performed the music; and after ASCAP brought a number of infringement suits, theater owners obtained performance licenses from it. When "talkies" were introduced in the late 1920s, movie producers recorded the sound, first on records and then on soundtracks. Since some of that sound was music, movie producers needed and obtained recording or synchronization licenses from composers and publishers.⁵⁶ Conceptually, this was correct, because producers recorded music but did not perform it, while movie theaters performed music but did not record it. This same conceptual logic applies in television today: producers record music on the soundtracks of their programs but do not themselves perform it, while television stations and networks perform the music on those soundtracks by broadcasting it but do not themselves record it.

Ironically, music licensing practices in the theatrical motion picture industry no longer conform to the conceptual logic of its earlier days.

4. Music Licensing in the Motion Picture Industry

Motion picture theaters first began obtaining blanket licenses from ASCAP in 1923 when movies were still silent, and the music performed by theaters was played by pianists and orchestras. In 1934, after "talkies" had become common, ASCAP negotiated a new form of blanket license with trade organizations representing movie theater owners. The license fee was based on seating capacity and was "very reasonable."⁵⁷ In 1947, however, ASCAP proposed a new formula—one which would have increased movie theater license fees 200% to 1500%. Naturally, theater owners protested and organized the Theater Owners of America to represent them in collective bargaining with ASCAP.⁵⁸ In 1948, a new rate was agreed to, one that resulted in fee increases of 25% to 30%.⁵⁹

Though the new rate was "fair and reasonable,"⁶⁰ ASCAP's initial proposal rekindled a long-dormant antitrust suit that had been filed

56. *Alden-Rochelle, Inc. v. ASCAP*, *supra* note 7, at 891-92.

57. *Id.* at 892.

58. *Cirace*, *supra* note 12, at 291.

59. *Alden-Rochelle, Inc. v. ASCAP*, *supra* note 7, at 895.

60. *Id.* at 896.

against it by the owners of 200 theaters. Furthermore, in an unrelated copyright infringement case filed by several ASCAP members against theaters that did not have licenses, the theater owners asserted (as an affirmative defense) alleged antitrust violations by ASCAP and its members. These two cases changed the manner in which music performance rights are licensed in the motion picture business.

Both cases held that ASCAP had acquired monopoly power over the music necessary for the exhibition of movies, and that ASCAP and its members had restrained trade by fixing the price charged for the right to use that music. In the antitrust case, *Alden-Rochelle v. ASCAP*,⁶¹ a Federal District Court in New York City restrained ASCAP from issuing performance licenses to movie theaters; and the court restrained ASCAP's members from refusing to grant performance licenses to movie producers at the same time as synchronization rights are granted. In the infringement case, *M. Witmark & Sons v. Jensen*,⁶² a Federal District Court in Minnesota denied ASCAP's members any recovery against the theaters they had sued, even though it was admitted that those theaters had publicly performed music for profit without a license to do so.

As a result of these two cases, theatrical motion picture producers now obtain performance licenses from composers and publishers at the same time synch rights are obtained. Producers then "pass along" to movie theaters the right to perform the music that is recorded on motion picture soundtracks. (The performance right so obtained is only the right to perform the music in motion picture theaters, however. It does not include the right to perform that music on television. Thus, it is still necessary for television networks and stations to have performance licenses, even when they broadcast movies originally produced for theatrical exhibition.)⁶³

The *Alden-Rochelle* and *Witmark* cases highlighted what some considered to be a loophole in the 1941 Consent Decree. Although the Decree prohibited ASCAP from acquiring the exclusive right to grant performance licenses, the Decree did not prohibit ASCAP from requiring its members to pool all of their licensing revenues, including those revenues received by composers and publishers who licensed the performance of their music themselves. In fact, ASCAP did require such pooling; and as a result, ASCAP members had little, if any, incentive to

61. 80 F. Supp. 888 (S.D.N.Y. 1948), *relief*, 80 F. Supp. 900 (S.D.N.Y. 1948).

62. 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom.* M. Witmark & Sons v. Berger Amusement Co., 177 F.2d 515 (8th Cir. 1949).

63. *Buffalo Broadcasting v. ASCAP*, *supra* note 31, at 284.

grant performance licenses to producers.⁶⁴

The 1950 amendment to the Consent Decree closed this loophole by prohibiting ASCAP from requiring its members to pool fees they receive from directly issuing their own performance licenses.⁶⁵ In addition, the 1950 amendment also eliminated ASCAP's purported ability to "fix" the prices charged to music users by providing that if a music user is dissatisfied with the fee demanded by ASCAP, the user may apply to the Federal District Court in New York City for an order determining a "reasonable" fee.⁶⁶

The 1950 amendment also incorporated the *Alden-Rochelle* order prohibiting ASCAP from issuing performance licenses to movie theaters.⁶⁷ However, given ASCAP's compliance with the 1950 amendment's prohibition against pooling fees received from direct licenses, and given the right that music users now have to apply for a court-determined reasonable fee, it is doubtful that *Alden-Rochelle* or *Witmark* would be decided again today the way they were in 1948. At least it was doubtful until the decision in the *Buffalo Broadcasting* case.

Whether or not *Alden-Rochelle* and *Witmark* would be decided the same today, it is historically significant that the advent of commercial television roughly coincided with those two cases and the subsequent amendment to the ASCAP Consent Decree. The reason it is significant is that the television industry's dissatisfaction with blanket licensing can be traced directly to ASCAP's refusal to apply the "*Alden-Rochelle* doctrine" to television broadcasting.

III. NETWORK DISSATISFACTION WITH BLANKET LICENSING

A. Early Network-ASCAP Negotiations

ASCAP issued its first blanket license to television in 1941 when television was still in its infancy. Apparently, ASCAP did so to promote the growth of the television industry and to establish the precedent that licenses were necessary, rather than to raise money, because that first license was gratuitous. By 1948, however, ASCAP decided that television, though still young, was old enough to pay something. As a result, ASCAP canceled the 1941 license and served notice of its intention to negotiate a license fee.⁶⁸

64. *CBS v. ASCAP*, *supra* note 12, at 133.

65. *US v. ASCAP*, *supra* note 24, at 63,752.

66. *Id.* at 63,754.

67. *Id.* at 63,752.

68. *Buffalo Broadcasting v. ASCAP*, *supra* note 31, at 287.

The negotiations were conducted on behalf of the television industry principally by the networks. Aware of the decision in *Alden-Rochelle*, the networks proposed that the doctrine of that case be extended to motion pictures broadcast on television. ASCAP refused to apply the *Alden-Rochelle* rule to television, however. And in 1949, the networks agreed to a blanket license that did not make any exception for motion pictures whose *theatrical* performance rights had been licensed by producers directly from composers or publishers.⁶⁹

B. Network Application for Limited License

The networks' blanket licenses were renewed every several years on substantially the same terms. In 1970, however, network dissatisfaction with ASCAP's blanket license percolated to the surface again. NBC studied the music it had broadcast and concluded that it did not need access to ASCAP's entire repertory. Rather, NBC determined that it could make do with a license to broadcast 2,217 specific compositions and certain background music. As a result, it asked ASCAP for a license for this music in particular; and when ASCAP declined, NBC went to court.⁷⁰

It was NBC's position that ASCAP's refusal to license anything less than its entire repertory was a violation of the antitrust laws. Nevertheless, the proceeding filed by the network in 1970 was not an anti-trust lawsuit. Rather, NBC filed an application under the 1950 Consent Decree for a judicial determination of a reasonable fee. In its application, NBC alleged that properly interpreted, the Consent Decree itself required ASCAP to grant the limited license NBC sought.

ASCAP of course disagreed. As it read the Consent Decree, it had no obligation to issue limited licenses. Furthermore, ASCAP argued, the license sought by NBC "would itself constitute an anti-trust violation because it would enable NBC, through its 200 affiliated stations, to 'pitch the might of the NBC television network' against unprotected individual composers, who would have to knuckle under to NBC's terms in order to have their songs performed on the air."⁷¹

The court declined the opportunity offered by both parties to answer the underlying "question . . . of broad antitrust policy."⁷² Instead, the court limited its inquiry to whether the limited license sought

69. *Id.* at 287-88.

70. *US v. ASCAP* (Application of National Broadcasting Co., Inc.), 1971 Trade Cas. ¶ 73,491 (S.D.N.Y. 1970).

71. *Id.* at 90,009.

72. *Id.*

by NBC was required by the Consent Decree. And the court found that it was not. The court construed the Consent Decree to permit limited licenses but not to require them. The provision authorizing the court to fix a reasonable fee if the parties themselves could not agree was merely a description of "how fees were to be set for licenses that ASCAP was bound to grant, [and did] not . . . delineate ASCAP's obligations to grant them."⁷³ The court also was influenced by the parties' prior dealings with one another.

The consistent practice of NBC in licensing the entire ASCAP repertory . . . for the twenty years since entry of the amended judgment is indicative of the intent of the judgment and is most persuasive that this is the correct interpretation of its terms. Two decades of acquiescence in this interpretation of the judgment is most relevant to a decision on this application.⁷⁴

Though not strictly necessary for its decision, the court also noted that ASCAP had "persuasively" pointed out that "a limited license for a bulk user of musical compositions, such as NBC, would be unworkable. Broadcasting live parades, sporting events and similar programs, in which bands perform without prior censorship of their selections, would make a license of some 2,200 of the tens of thousands of available musical works completely illusory."⁷⁵

NBC accepted the court's ruling. In the meantime, however, CBS had initiated a legal attack of its own on blanket licensing — an attack which would occupy the attention of the courts and the industry for the next twelve years.

C. *The CBS v. ASCAP Case*

1. "The Break-Up of an Amicable Marriage"⁷⁶

CBS has held blanket licenses since 1929 when it obtained one from ASCAP for a radio station. Though CBS may have desired an *Alden-Rochelle* "carve-out" provision in 1949 when television blanket license fees first were negotiated⁷⁷—a provision which it did not get—"CBS appears to have lived quite happily with the blanket arrangement"⁷⁸ until 1969. Ironically, CBS's legal attack on blanket licensing

73. *Id.* at 90,010.

74. *Id.*

75. *Id.*

76. *CBS v. ASCAP*, *supra* note 8, at 753.

77. *See* footnote 69, *supra*, and accompanying text.

78. *CBS v. ASCAP*, *supra* note 8, at 753.

was not triggered by ASCAP's refusal to issue an alternate form of license. Indeed, in 1969, CBS and ASCAP agreed on new blanket license fees. However the size of the new ASCAP fees "would have had the effect of sharply widening the historical ratio between BMI and ASCAP fees from CBS," and BMI responded by insisting on "maintaining parity with ASCAP."⁷⁹ When BMI and CBS were unable to agree on new fees between them, BMI canceled its blanket license to CBS as of January 1, 1970. Then, and only then, did CBS ask BMI and ASCAP to state the terms on which they would issue licenses which would provide for "payments measured by the actual use of [their] music."⁸⁰ ASCAP and BMI both responded by saying that they were willing to discuss the matter. But CBS chose not to pursue it. Instead, on December 31, 1969, it filed an antitrust suit against both organizations in the Federal District Court for the Southern District of New York.

In its complaint, CBS alleged that the licensing practices used by ASCAP and BMI—though consistent with the Consent Decrees—constituted illegal price fixing, boycotting and tying in violation of the Sherman Act.

2. The District Court Rulings

Early in the lawsuit, ASCAP made a motion for summary judgment seeking dismissal of CBS's complaint. ASCAP's motion was based on the contention that *K-91, Inc. v. Gershwin Publishing Corp.*⁸¹ had rejected the very same antitrust claims then being made by CBS. The court agreed that CBS's allegations were "substantially similar" to those made in *K-91*, but it found that "one outstanding difference exists between the two cases which compels a denial of ASCAP's motion."⁸² The difference was that in *K-91*, no alternative to blanket licensing was proposed. Indeed, in *K-91*, the parties had stipulated that it would be "practicably and virtually impossible"⁸³ for radio stations to acquire, or for composers and publishers to issue, separate licenses for each broadcast of a musical composition. CBS, on the other hand, did propose what it considered to be a practical alternative to blanket licensing, namely "per use" licensing. (CBS's proposal called for music users to pay a lump sum for a "library card right" to use any song in the ASCAP and BMI repertoires. In addition, the user would pay an addi-

79. *Id.*

80. *Id.*

81. 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968).

82. CBS v. ASCAP, *supra* note 7, at 398.

83. *Id.* at 400.

tional fee each time music covered by the "library card" actually was broadcast, unless a license for such use were obtained directly from the composer or publisher.)⁸⁴ Furthermore, in the context of network television, the court doubted the practical value of CBS's right to deal directly with individual composers and publishers, saying that it was inclined to believe that this right was "more apparent than real."⁸⁵ This then made the feasibility of CBS's "per use" proposal a key question in the case. Because there were genuine issues of material fact concerning this question, CBS was entitled to prove its contentions at trial; and this was the reason the court denied ASCAP's motion for summary judgment.

Ironically, after an eight-week trial, the court did not reach the issue of the feasibility of CBS's "per use" proposal. It did not, because it found — contrary to its initial inclination — that the network's right to deal directly with individual composers and publishers *was* real. Indeed, it was so real that blanket licensing by ASCAP and BMI did not restrain trade at all, because CBS simply was not compelled to take a blanket license. Instead, CBS had a realistic alternative: it could have obtained performance licenses for the music it wanted to use directly from the more than "3,500 publishers and many thousands of composers who are eager for exposure of their music."⁸⁶

The court found that the mechanics for such direct licensing would not be as complex as CBS asserted. Program producers could obtain network performance licenses in one of two ways, depending on the nature of the music in question. The copyrights to music written especially for particular programs by composers-for-hire usually belong to publishers owned or controlled by the producers themselves. Thus, producers themselves frequently have the power to license the performance of that music. Although the copyrights to pre-existing music usually belong to unaffiliated publishers, producers must deal with them (either directly or through agents) to obtain synchronization licenses; and the court found that it would be possible for producers to obtain performance licenses at the same time in the same transaction.

For this reason, the court rejected CBS's claims that ASCAP and BMI were guilty of price fixing, tying, boycotting, or monopolization.⁸⁷

84. *Id.* at 397 n.1.

85. *Id.* at 401.

86. *CBS v. ASCAP*, *supra* note 8, at 779.

87. *Id.* at 781-82.

3. The First Court of Appeals Decision

CBS appealed, and the Second Circuit Court of Appeals reversed.⁸⁸ The appellate court agreed that performance licenses could be obtained directly from composers and publishers. But according to the Court of Appeals' complex reasoning, the availability of such direct licensing made blanket licensing illegal rather than legal. The appellate court explained that the availability of direct licensing saved blanket licensing from being an illegal tie-in or block-booking. But a majority of the appellate court said that the availability of direct licensing did not resolve CBS's price-fixing charge. According to the majority, blanket licensing results in "at least the threshold elimination of price competition" for performance licenses; and the existence of blanket licensing "dulls" the "incentive" of composers and publishers to compete with one another by issuing their own individual performance licenses.⁸⁹

Though price-fixing is usually illegal *per se*, the Court of Appeals concluded that it is not illegal where market circumstances are such that some form of price-fixing "is absolutely necessary for the market to function at all."⁹⁰ In this case, however, the District Court had found that performance licenses for individual songs could be obtained directly from composers and publishers; and thus, the Court of Appeals concluded that blanket licensing is not absolutely necessary. Since it is not, the market-necessity exception to the rule that price-fixing is illegal *per se* did not apply. And that is why a majority of the appellate court ruled that blanket licensing is illegal.

Despite its conclusion that blanket licensing is illegal *per se*, the appellate court did not order that its use be enjoined. Instead, it acknowledged that blanket licensing may "serve a market need" and "is not simply a 'naked restraint' ineluctably doomed to extinction."⁹¹ The Court of Appeals therefore indicated that if ASCAP and BMI were required to provide some form of per use license which ensured competition among composers and publishers, blanket licenses might still be issued to those who preferred them.

Circuit Judge Moore concurred in the majority's conclusion to remand the case. His reasons for doing so were unclear, however, because he specifically noted his disagreement with the majority's ruling that blanket licensing is a form of price-fixing that is not saved by the

88. CBS v. ASCAP, *supra* note 12.

89. *Id.* at 139.

90. *Id.* at 136.

91. *Id.* at 140.

"market necessity" defense.⁹² Judge Moore's views of the case eventually became quite significant. In the meantime, however, it was ASCAP's and BMI's turn to appeal, and appeal they did to the United States Supreme Court.

4. The Supreme Court Decision

The Supreme Court agreed to hear the case, and in 1979, it reversed the Court of Appeals. In a decision issued under the name *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,⁹³ the Court held that the blanket licenses issued by ASCAP and BMI are not illegal *per se*. Justice White, writing for an eight-to-one majority, acknowledged that price-fixing agreements are illegal *per se*. "But," he added, "easy labels do not always supply ready answers."⁹⁴ The Supreme Court had never examined a practice like blanket licensing before. Indeed, it noted that "[i]n dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are *sui generis*."⁹⁵

Furthermore, the Court quoted with approval from an *amicus* memorandum the Justice Department had filed in the *K-91* case in which the Government had argued that ASCAP's blanket licensing of radio stations was not illegal *per se* nor even an unreasonable restraint of trade. "The Sherman Act has always been discriminately applied in light of economic realities," the Government had said.⁹⁶ And in the radio industry at least, the "economic realities" required blanket licensing. That view had satisfied the Supreme Court sufficiently in 1968 that it denied *K-91*'s petition for certiorari. Eleven years later in the *CBS* case, the Justice Department filed an *amicus* brief indicating that it still was of the view that blanket licensing was not illegal *per se*, though the Department took no position on whether blanket licensing was an unreasonable restraint of trade in the network television business.

The Court took note that in the new Copyright Act, Congress itself provided for blanket licensing of cable television systems, jukebox operators and noncommercial broadcasters. "Though these provisions are not directly controlling, they do reflect an opinion that the blanket

92. *Id.* at 141.

93. 441 U.S. 1 (1979).

94. *Id.* at 8.

95. *Id.* at 10 (quoting the Court of Appeals' decision in *CBS v. ASCAP*, *supra* note 12, at 132).

96. *Id.* at 14.

license, and ASCAP, are economically beneficial at least in some circumstances."⁹⁷

The Court also noted that,

. . . the line of commerce allegedly being restrained, the performance rights to copyrighted music, exists at all only because of the copyright laws. . . . Although the copyright law confers no rights on copyright owners to fix prices among themselves or otherwise violate the antitrust laws, we would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a *per se* violation of the Sherman Act. Otherwise, the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all or would exist only as a pale reminder of what Congress envisioned.⁹⁸

And the Court expressed the view that a blanket license is not a "naked restraint of trade . . . but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use."⁹⁹

Finally, the Court described the blanket license as being "truly greater than the sum of its parts; it is, to some extent, a different product."¹⁰⁰ To the extent the blanket license is a different product, ASCAP and BMI are not joint selling agencies offering the individual songs of many composers and publishers, but are separate sellers offering their own product: a blanket license "of which the individual compositions are raw material."¹⁰¹

The Court remanded the case to the Second Circuit where it appeared that blanket licensing would be evaluated under the rule of reason. When the Court of Appeals took up the case a second time, however, it found it unnecessary to make such an evaluation.

5. The Second Court of Appeals Decision

By the time the case returned to the Court of Appeals, two of the three judges who had heard it before had passed away. Judge Moore — who wrote a concurring opinion the first time — remained. But Judge Newman wrote the decision of a unanimous panel following the second oral argument. The decision the second time

97. *Id.* at 16.

98. *Id.* at 18-19.

99. *Id.* at 20.

100. *Id.* at 21-22.

101. *Id.* at 22.

around was that the blanket licenses offered to the networks by ASCAP and BMI do not restrain trade at all, let alone unreasonably. In so ruling, the Court of Appeals affirmed the District Court's original decision, for the reasons given in the District Court's opinion. That is, the Court of Appeals finally agreed that blanket licenses do not restrain trade if alternatives are realistically available. Here, the alternative — direct licenses from individual composers and publishers — was found to be "fully available." This being so, the court ruled that ASCAP and BMI do not violate the antitrust laws by offering blanket licenses to the television networks.¹⁰² The Supreme Court denied CBS's petition for certiorari.¹⁰³

IV. LOCAL TV STATION DISSATISFACTION WITH BLANKET LICENSING

A. Local Stations Distinguished from Network Stations

There are more than 750 commercial television stations in the United States. ABC, CBS and NBC have approximately 200 affiliates each, and thus about 600 of the nations' commercial stations are network affiliates. The unaffiliated 150 or so stations are known as "independents." But in the parlance of the *Buffalo Broadcasting* case, all but fifteen of the more than 750 are "local television stations." The three networks own five television stations each, and these fifteen stations are the only ones that are not "local" stations. All the rest are local stations, including the 600 that are affiliated with the networks (though owned by someone else).¹⁰⁴

Local television stations broadcast three kinds of programming. Those that are network affiliates devote a substantial portion of their time to *network programming* such as national news, sporting events, prime-time series, and specials.¹⁰⁵

Network affiliates and independent stations broadcast *syndicated programming*. Syndicated programs are of several types. Most of them are "off-network" programs — that is, programs that were first broadcast by network owned and affiliated stations. Syndicated programming also includes theatrical motion pictures that have completed their theater "runs." (Theatrical motion pictures suitable for television usually are broadcast by one of the networks — and recently, by one or

102. 620 F.2d 930 (2d Cir. 1980).

103. 450 U.S. 970 (1981).

104. *Buffalo Broadcasting v. ASCAP*, *supra* note 31, at 279.

105. *Id.*

more of the pay-television services — before they are syndicated.) Syndicated programming also includes “first-run” syndicated programs which are shows that are produced especially for syndication.¹⁰⁶

Finally, network affiliates and independents also broadcast *locally produced programming* — that is, programs which local stations produce themselves. Locally produced programs usually are local news, sports, public affairs and talk shows.¹⁰⁷

The *CBS* case concerned only the licensing of music for use in network programming. It did not deal with the licensing of music for syndicated or locally produced programming. *Buffalo Broadcasting*, on the other hand, dealt solely with syndicated (including off-network) and locally produced programming.¹⁰⁸

B. The All-Industry Television Station Music License Committee

ASCAP's negotiations with the television industry in 1948 and 1949 were conducted on behalf of television broadcasters principally by the networks. Though an agreement was reached in 1949, local stations were not satisfied with it. As a result, in 1949, local stations organized the All-Industry Television Station Music License Committee to act as their collective bargaining representative in future negotiations with ASCAP and BMI.¹⁰⁹

When the ASCAP Consent Decree was amended in 1950 to allow for the judicial determination of a “reasonable fee,” the Committee filed an application for such a determination in an effort to lower its members' license fees. Apparently, the Committee enjoyed some success, because in 1954, before the court issued a ruling, the proceeding was settled and a new industry-wide licensing agreement was signed.¹¹⁰ Another such agreement was signed in 1958. But in 1962, negotiations broke down, and local stations petitioned the District Court under the Consent Decree once again.

C. Local Station Application for New Form of License

The license agreements negotiated in 1949, 1954 and 1958 all required local television stations to pay fees for music used in syndicated and locally produced programming. Those agreements did not require network affiliates to pay fees for network programming, because the

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 288.

110. *Id.*

networks themselves obtained blanket licenses for the programs their own stations and affiliates broadcast.

When the 1958 agreement was about to expire, the Committee asked ASCAP for a local station license that would have excluded syndicated as well as network programming from its fee formula. The Committee did not deny the need for performance licenses for syndicated programming. Local stations merely intended to have the producers of syndicated programs get the licenses themselves, from ASCAP or from composers and publishers directly. The Committee apparently believed that producers could get performance licenses more cheaply. Or perhaps the Committee believed that producers would not seek — or would not be able — to pass along the cost of performance licenses when they sold local stations the right to broadcast their programming. The Committee wanted ASCAP to continue issuing blanket licenses to local stations for the music they used in the original programming they produced themselves, however.

ASCAP refused to issue the sort of license requested by the Committee. As a result, 335 local television stations filed a petition under the ASCAP Consent Decree asking the District Court to fix a reasonable fee for the sort of license the Committee had proposed. The court refused to do so, however. It ruled that the license the Committee sought was "a radically different license" from those that had been in use for the past twelve years — and, more importantly, was one which the Consent Decree did not require ASCAP to issue.¹¹¹ The Second Circuit Court of Appeals affirmed;¹¹² and the United States Supreme Court denied the stations' petition for certiorari.¹¹³

Although the local stations argued that ASCAP's refusal to issue the type of license they sought was anti-competitive, the only issue decided by the case was that the ASCAP Consent Decree did not require such a license. In fact, the Court of Appeals concluded its decision with some legal advice. If the local stations' contention "has the merit under the antitrust laws which they assert, they have effective remedies available,"¹¹⁴ the appellate court explained. They could persuade the Justice Department to apply for a modification of the Consent Decree. Or they could bring a private antitrust suit of their own. Fourteen

111. *US v. ASCAP* (Application of Shenandoah Valley Broadcasting, Inc.), 208 F. Supp. 896 (S.D.N.Y. 1962).

112. 331 F.2d 117 (2d Cir. 1964).

113. 377 U.S. 997 (1964).

114. 331 F.2d at 124.

years later, local stations took that advice by filing the *Buffalo Broadcasting* case.

D. *The Buffalo Broadcasting Case*

In 1978, five owners of local television stations filed a class action lawsuit against ASCAP, BMI and their members and affiliates. The complaint alleged that the blanket licensing of local stations is an anticompetitive restraint of trade. More particularly, the plaintiffs asserted that blanket licensing is "needless, anomalous, inefficient and coercive";¹¹⁵ that the "splitting"¹¹⁶ of performance and synchronization rights results in the absence of price competition among musical compositions; and that market "realities"¹¹⁷ prevent local stations from obtaining reasonable alternatives. As a result, the plaintiffs sought an injunction prohibiting ASCAP and BMI from issuing performance licenses to local stations in order to permit the "evolution"¹¹⁸ of a licensing system in which composers and publishers compete with one another. The "brave new world"¹¹⁹ envisioned by the plaintiffs is one in which producers of syndicated programming obtain performance licenses directly from composers and publishers at the same time synchronization rights are obtained. The plaintiffs also claimed — at least at first — that local stations wanted the "opportunity"¹²⁰ to obtain performance licenses directly from composers and publishers for the original programs local stations produce themselves.

ASCAP and BMI disputed all of the plaintiffs' contentions, including the contention that blanket licensing eliminates price competition. As far as ASCAP and BMI were concerned, *Buffalo Broadcasting* was nothing more than an "off-network rerun"¹²¹ of the *CBS* case, and as such, should have been dismissed.

1. The August 1982 Opinion

In August of 1982, following a lengthy trial, the court concluded that the blanket licensing of local television stations does restrain trade in violation of Section 1 of the Sherman Act, and that therefore, ASCAP and BMI, and their members and affiliates, had to be enjoined

115. *Buffalo Broadcasting v. ASCAP*, *supra* note 31, at 285.

116. *Id.*

117. *Id.*

118. *Id.* at 276.

119. *Id.* at 285.

120. *Id.*

121. *Id.*

from continuing to do so.¹²²

The court agreed that the *CBS* case was the controlling precedent; and it agreed with *CBS* that blanket licensing would not restrain trade at all if there were "realistically available alternatives." The court defined "realistically available alternatives" as those that were reasonably efficient and not unreasonably costly.¹²³ The court then considered the alternatives available to local television stations, and it concluded that none were realistically available.

The court found that per program licenses were too costly and too burdensome to be realistically available (despite the Consent Decrees' requirement that per program licenses be offered on terms that guaranty music users a "genuine economic choice").¹²⁴

The court also found that local stations could not realistically obtain licenses directly from copyright owners (such licenses are known as "direct licenses"), because it would be impractical and expensive for stations to search for and obtain licenses from thousands of composers and publishers. In *CBS*, it was found that the Harry Fox Agency could and would expand its functions to serve as a publishers' agent for the issuance of performance as well as synchronization licenses. However, the *Buffalo Broadcasting* court distinguished *CBS*. It did so on the grounds that although the networks have sufficient market power to compel publishers to issue performance licenses directly, local stations (acting individually) do not have the power to do so. Since local stations do not have sufficient market power to compel publishers to issue performance licenses directly, the Fox Agency would have no reason to expand its operations.¹²⁵

Similarly, the court found that altogether the networks have sufficient market power to compel producers to obtain performance licenses directly from composers and publishers (such licenses are known as "source licenses"), local stations do not have such power; and therefore, producers would not do so.¹²⁶

For these reasons, the court concluded that insofar as local television stations are concerned, there is no realistically available alternative to blanket licensing, so long as blanket licensing is permitted.

Having determined that blanket licensing does restrain trade in the local television business — unlike the network television business

122. *Id.* at 296.

123. *Id.* at 286.

124. *Id.* at 288-89.

125. *Id.* at 289-91.

126. *Id.* at 291-93.

where it does not — the court proceeded to balance its restraints against its benefits under the rule of reason. According to the court, the anticompetitive effects of blanket licensing are “apparent.”¹²⁷ Compositions are sold on an all-or-nothing basis so that the selling power of one adds to that of the others and the monopoly power of all is enlarged. Furthermore, blanket licensing prevents price competition. And it prevents local stations from reducing their music costs by reducing their use of music.¹²⁸

The court did acknowledge that blanket licensing does have “recognized virtues” and “efficiencies”¹²⁹ which make it pro-competitive and necessary for users such as nightclubs and restaurants that cannot predict their music needs. However, said the court, television stations are not akin to local taverns in this regard, and the benefits of blanket licensing of television stations do not balance its burdens for several reasons.

First, the court found that the transaction cost savings afforded by blanket licensing are negligible, because performance licenses can be obtained by producers at the same time they obtain synchronization licenses. (For reasons explained below, blanket licensing does afford transaction cost savings.) The transaction cost savings for locally produced programming also were found to be “insignificant”—at least at first—because local stations deal directly with “many” of the composers and publishers of music used in locally produced programs.¹³⁰

The court said that there had been no indication that monitoring costs would be significant in the absence of blanket licensing, because there is no “credible threat” of unauthorized use of music by local television stations.¹³¹ (No evidence was cited in support of this optimistic conclusion; and the court failed to explain how local stations could be certain that music in syndicated programming is properly licensed.)

Nor does blanket licensing reduce “up-front” costs for producers because performance rights fees are only a “miniscule percentage” of the cost of producing programs.¹³² (In fact, performance rights fees are *no* portion of the cost of *producing* television programs, because such fees have been paid by broadcasters, not producers.)

Finally, the court found that flexibility is not important for syndi-

127. *Id.* at 293.

128. *Id.* at 293-94.

129. *Id.* at 294.

130. *Id.* at 294-95.

131. *Id.* at 295.

132. *Id.*

cated programming, because unplanned performances of music on television are rare.¹³³ (The court failed to say what should be done in those rare instances, however.)

Thus, the court concluded that the insignificant cost savings of blanket licensing do not balance its anti-competitive consequences. And this was the reason the court ruled that blanket licensing violates the Sherman Act and "must accordingly be enjoined."¹³⁴ It took until January of 1983 for the parties and the court to work out the exact language of the injunction.

2. The January 1983 Judgment

Following the court's August 1982 opinion, the parties spent the balance of 1982 trying to work out mutually satisfactory language for an injunction, but by and large were unable to do so. The court held several post-trial hearings and ruled on some areas of disagreement. Finally, in January of 1983, a Judgment and Permanent Injunction was signed and entered.¹³⁵

The judgment enjoins ASCAP and BMI from granting performance licenses to local television stations for music used in *syndicated* programs, commencing February 1, 1984.¹³⁶ Apparently, the reason for the year's delay in the effective date of the injunction is to allow time for ASCAP and BMI to appeal (they have), and to give the industry time to adjust its music licensing procedures. It should be noted that the injunction bars ASCAP and BMI from issuing performance licenses of any kind to local stations.¹³⁷ ASCAP and BMI therefore are prohibited from issuing not only blanket and per program licenses, but even per use licenses (that is, licenses for the use of individual compositions). The purpose of this sweeping prohibition seems to be to compel composers and publishers to issue performance licenses to producers at the same time they issue synchronization licenses.

The judgment contains one provision that is surprising in light of the plaintiffs' original contentions and the court's August 1982 opinion. ASCAP and BMI are *not* prohibited from granting local stations "any form of mutually agreed upon license" for music used in *locally pro-*

133. *Id.* at 295-96.

134. *Id.* at 296.

135. Judgment and Permanent Injunction in *Buffalo Broadcasting v. ASCAP*, U.S.D.C., S.D.N.Y. Case No. 78 Civ. 5670 (filed and entered Jan. 4, 1983).

136. *Id.* at 11.

137. *Id.* at 4.

duced programming.¹³⁸ Apparently, once the thrill of victory subsided, even the plaintiffs perceived that when local stations themselves act as producers, the efficiency and convenience of blanket licensing may well outweigh the supposedly anti-competitive effects it has on price, and thus local stations may want to obtain blanket licenses for the programs they produce themselves. This means that of the three types of television programming — network, syndicated and locally produced — blanket licensing is illegal only for one type: syndicated programming.

The judgment also provides that during the year between February 1, 1983 and February 1, 1984 (the judgment's effective date), local stations have the right to obtain blanket licenses, even for syndicated programs, by paying the same license fees they paid in 1980. These fees are to be paid in monthly installments and may be canceled by local stations on 30 days notice. This provision seems to recognize that until the effective date of the injunction, there will be little if any direct licensing by composers and publishers, and until there is, local stations will need blanket licenses. If the effective date of the injunction is postponed beyond February 1, 1984, or if local stations do begin to obtain performance licenses directly, the judgment authorizes stations to seek a reduction in the blanket license fee below the 1980 amount.¹³⁹

After the judgment has been in effect five years, ASCAP and BMI are authorized to apply to the court for permission to issue per program licenses for syndicated programs.¹⁴⁰ Apparently, this provision was included because the plaintiffs and the court recognized that licensing by composers and publishers may not achieve the economies that are expected by the plaintiffs and the court, and a reversion, at least in part, to past practices may be appropriate. The five-year wait seems designed to assure the creation of the necessary apparatus for the negotiation of performance licenses on a composition-by-composition basis.

Finally, the court retained jurisdiction to determine the amount of damage, if any, that local stations have suffered on account of blanket licensing.¹⁴¹ Trial of that issue has been postponed, pending a decision on ASCAP's and BMI's appeal.

3. Issues Raised by the Opinion and Judgment

Because the facts of *CBS* were virtually identical to those of *Buffalo Broadcasting*, and because blanket licensing now has been out-

138. *Id.*

139. *Id.* at 7-9.

140. *Id.* at 10.

141. *Id.* at 5-7.

lawed only for syndicated programming but not for network or locally produced programming, the *Buffalo Broadcasting* case raises three issues.

First, was the court in *Buffalo Broadcasting* correct in concluding that local television stations do not have sufficient bargaining power to induce composers and publishers to grant performance licenses to producers at the same time synchronization licenses are issued? The court's conclusion that local stations do not have sufficient bargaining power to do so was not a finding of observed fact, because local stations had never asked for such licenses before the complaint in *Buffalo Broadcasting* was filed.¹⁴² Rather, the court's conclusion concerning the bargaining power of local stations was based on nothing more than economic theory applied to the court's findings concerning the structure of the television industry. Findings concerning *structure* and findings concerning *power* are not the same thing, however. Moreover, given the structure of the television industry as actually found by the court, economic theory and studies indicate that local stations do have the bargaining power to induce source licensing by producers.

Second, should the result in *Buffalo Broadcasting* (or the result in *CBS* for that matter) have turned on the power of broadcasters to avoid blanket licensing? In other words, assuming broadcasters do not have the power to compel alternate forms of licensing, does blanket licensing affect competition in a way that it should be illegal?

Finally, what does the result in *Buffalo Broadcasting* say about the role of economic theory, and its relation to legal doctrine, in the interpretation of the antitrust laws?

V. ECONOMICS AND THE BARGAINING POWER OF LOCAL STATIONS

The single most significant finding made by the court in *Buffalo Broadcasting* was that local television stations do not have sufficient bargaining power to induce producers to obtain performance licenses directly from composers and publishers. In the court's view, local stations lack the bargaining power to do so, except at "premium prices," for the following reason.

In most television markets there are three . . . local stations. . . . Thus, . . . despite the large number of syndicators and syndicated programming available to local stations, competition within each television market for desirable programs on whose acquisition the viability of most local stations de-

142. *Buffalo Broadcasting v. ASCAP*, *supra* note 31, at 291.

pendis is vigorous. . . . The evidence also establishes that the distribution of syndicated programs is concentrated on eight leading companies. In 1981 these companies distributed 52% of all syndicated programs (not including motion pictures produced initially for theatrical exhibition) and 82% of the off-network syndicated programs. The broadcast of some of the syndicated programming distributed by these companies is essential to the successful, profitable operation of most local television stations. This concentration in the distribution market lends additional support to the conclusion that, within each television market, the distributor is often in a powerful bargaining position vis-a-vis the local television station seeking to purchase syndicated programming, particularly with regard to desirable off-network programs.¹⁴³

The court's conclusion is faulty in four respects. First, the court concluded that "competition within each television market . . . is vigorous" because three local stations bid against one another for desirable syndicated programming. On the other hand, the court concluded that the distribution of such programming is "concentrated" in eight companies. These conclusions are exactly the reverse of what they should have been. For according to economic theory, a market with only three buyers is "concentrated" while a market with eight sellers (which together account for 52% to 82% of sales) is "competitive." Indeed, according to the Merger Guidelines of the Department of Justice, which use the Herfindahl-Hirschman Index of market concentration, a three-firm market is deemed "highly concentrated" while a market in which eight firms account for 52% to 82% of sales is characterized as "unconcentrated."¹⁴⁴ One economist known for his work in the field of industrial organization considers three-firm markets in general to be "very highly concentrated"¹⁴⁵ and the local television market in particular to be highly or very highly concentrated.¹⁴⁶ On the other hand, he considers markets in which eight firms control 45% to 70% to have only "low-moderate" concentration.¹⁴⁷ One economist who has studied the music industry has said that "[w]hen there are only three major buyers, those buyers have substantial monopsony [i.e., buyers' monopoly]

143. *Id.* at 280-81.

144. Department of Justice, Antitrust Division, Merger Guidelines, 47 Fed. Reg. 28493, 28497 (1982).

145. J. Bain, *Industrial Organization* 137 (2d ed. 1968).

146. *Id.* at 145.

147. *Id.* at 141.

power — the power to lower prices.”¹⁴⁸

Second, as the *Buffalo Broadcasting* court itself acknowledged, there are actually hundreds of syndicators and thousands of syndicated programs.¹⁴⁹ Because of the very small number of stations in each market as compared to the large number of syndicators and programs, economists who have studied the television industry have concluded that the distributor side of the syndication business is “competitively structured”¹⁵⁰ and that local stations enjoy bargaining leverage over the distributors¹⁵¹ — not vice versa as the court found in *Buffalo Broadcasting*. In fact, it has been observed that in markets having only a small number of stations and small audiences, prices for syndicated programs are likely to be close to the marginal costs of distributing those programs.¹⁵² In larger markets, the price of syndicated programming depends on several factors including the popularity of the program, the number of runs licensed, the amount of advertising time available during the program, the presence or absence of an independent station in the market, the market’s size, and whether the owner of the buying station owns other stations as well.¹⁵³

Third, the court found that (in 1981) 57% of the 200 leading syndicated programs were off-network shows.¹⁵⁴ As to this 57%, the bargaining power of local stations should not have been measured alone; because insofar as these programs are concerned, the bargaining power of local stations rides “piggy-back” on the networks’ power to induce source licensing by producers. Because it failed to consider this “piggy-back” effect, the court significantly understated the extent to which source licensing is a “realistically available alternative” to blanket licensing. The remaining 43% of the leading syndicated programs were first-run programs.¹⁵⁵ The economics of first-run syndication are such that distributors must be responsive to the wishes of local stations. This is so, because first-run syndications must earn enough to cover production as well as selling and distribution expenses,¹⁵⁶ and it takes revenue from a significant number of local stations to do so. In fact, first-run

148. Cirace, *supra* note 12, at 281 n.34.

149. *Buffalo Broadcasting v. ASCAP*, *supra* note 31, at 280.

150. 2 FCC Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* 566 (1980).

151. *Id.* at 529.

152. *Id.*

153. *Id.* at 425, 641-42.

154. *Buffalo Broadcasting v. ASCAP*, *supra* note 31, at 279.

155. *Id.*

156. FCC Network Inquiry Special Staff, *supra* note 150, at 641.

programming rarely goes into production at all until a sufficient number of local stations have agreed to purchase the program to cover its anticipated production costs.¹⁵⁷

Fourth, the court concluded that local stations lack bargaining power because competition within each market for desirable programs is "vigorous" while the distribution of syndicated programs is "concentrated." In fact, the distributors of popular programs would enjoy the same degree of bargaining power, and competition among local stations would remain just as vigorous, even if there were thousands of syndicators each with just a fraction of the market. This is so because each television program as a whole (as well as the music in it) is protected by copyright.¹⁵⁸ Thus, the syndicator of each program enjoys a complete but perfectly legal *monopoly* as to that particular show.

For these reasons, local stations do have the power to induce source and direct licensing. Therefore, blanket licensing of local stations is legal, just as the *CBS* case held that blanket licensing of networks is legal. Moreover, even if local stations do lack the bargaining power to induce source and direct licensing, blanket licensing does not give ASCAP and BMI the power to charge greater than competitive prices; and therefore, it should not have been held illegal in any event.

VI. THE ECONOMICS OF MUSIC LICENSING

A. General Principles

Under perfectly competitive conditions, price and quantity are determined by the market forces of supply and demand. The quantity of an item that is produced, and the price that is charged for it, are portrayed on a graph by the intersection of the supply and demand curves for that item; for at that intersection the amount purchased at the price charged will be equal to the amount supplied at the price paid.¹⁵⁹ However, the natural market forces of supply and demand do not operate normally in the music business for four reasons.

First, the supply curve for an item usually is the same as its marginal cost curve¹⁶⁰ (a concept explained below); but the marginal cost of additional consumption of musical compositions is zero or even nega-

157. *Id.* at 413.

158. 17 U.S.C. § 102(a)(3), (6), (7).

159. P. Samuelson, *Economics* 57 (11th ed. 1980); L. Sullivan, *Handbook of the Law of Antitrust* 800-01 (1977).

160. P. Samuelson, *supra* note 159, at 430; E. Gellhorn, *Antitrust Law and Economics* 55 (2d ed. 1981).

tive.¹⁶¹ This means that according to economic theory, the "competitive" price for music would be zero (or less) — a price at which no one would sell for long in the real world. Second, musical compositions can be "consumed" without leaving less for others to consume (unlike apples, for example, which when consumed do leave less for others).¹⁶² Third, once music has been heard by the public, it is difficult (and expensive) to prevent people from using it, even if they do not pay for it (unlike apples which can be withheld from the market and released only in exchange for payment). Furthermore, "free riders" who use music without paying for it do not contribute towards the cost of creating that music, nor do they pay the full cost of their own use of it.¹⁶³ For these three reasons, natural market forces would not work in the music business *even if* thousands of individual composers offered to issue individual per use licenses to thousands of individual music users at prices determined by direct one-to-one negotiations.¹⁶⁴

The fourth reason natural market forces do not work in the music business is that historically, and for good reasons, blanket licenses have been the norm.¹⁶⁵ These blanket licenses have been issued by ASCAP and BMI which are virtual monopolists in the *blanket* license market. And in most cases, ASCAP's and BMI's customers are, or have banded together in industry-wide trade associations to become, virtual monopsonists.¹⁶⁶

Although natural market forces are not at work in the music business, the forces actually at work can be described.

B. *The Economics of Blanket Licensing*

Figure 1 is a graphic portrayal of the supply and demand forces at work in the ASCAP and BMI markets for *blanket* licenses.

Figure 1's vertical axis measures the Price of each blanket license issued and the Cost to ASCAP or BMI of supplying it. The horizontal axis measures the number of blanket licenses issued. Since each music

161. See *infra* text accompanying notes 172-74.

162. BMI v. Moor-Law, Inc., *supra* note 16, at 763; Cirace, *supra* note 12, at 282.

163. BMI v. Moor-Law, Inc., *supra* note 16, at 763.

164. Cf., Cirace, *supra* note 12, at 298, 300-03.

165. See *supra* text accompanying notes 1 through 42.

166. See *supra* text accompanying note 109; BMI v. Moor-Law, Inc., *supra* note 16, at 761; Cirace, *supra* note 12, at 281.

user needs only one blanket license from each organization,¹⁶⁷ the number of licenses issued is equal to the number of music users who take them.

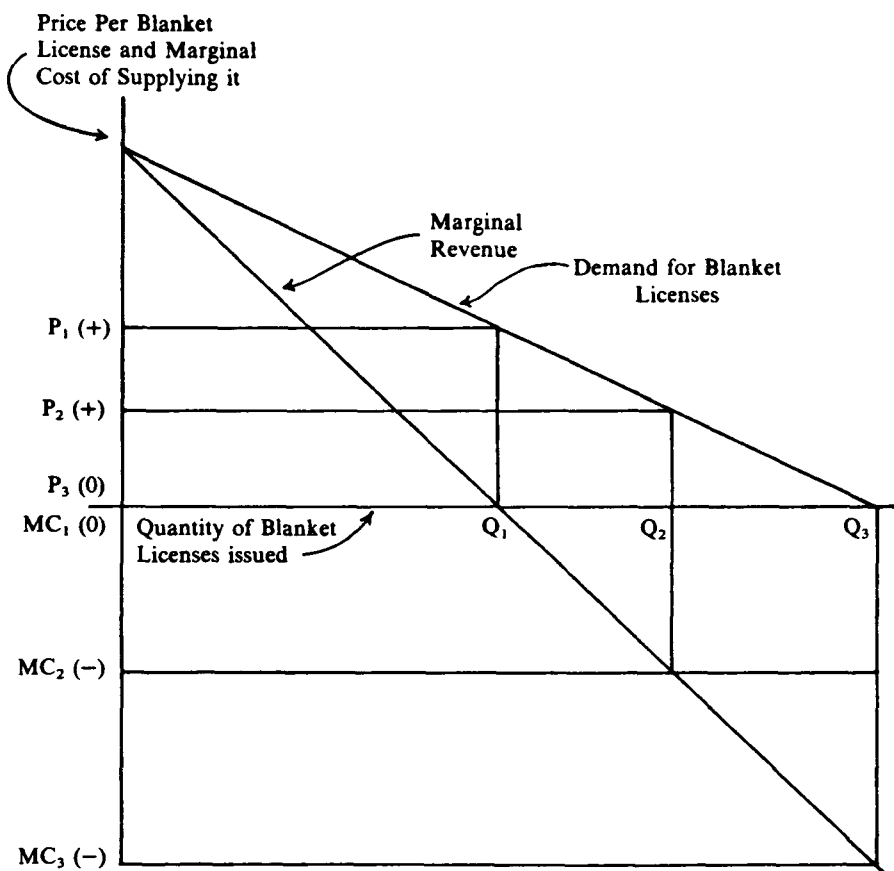


Figure 1

The Demand Curve for Blanket Licenses slopes downward and to

167. Because a blanket license authorizes the use of all of the compositions in the organization's repertory. See *supra* note 8, and accompanying text.

the right (as does the demand curve for virtually every other commodity or service).¹⁶⁸ This is so for the logical reason that as the price of a blanket license drops, more music users will take licenses. At any one moment, the number of music users is finite, and thus the number of blanket licenses that can be issued — even at a price of zero — is finite as well. For simplicity, the Demand Curve in Figure 1 is shown as a straight line which tapers evenly to a price of zero (P3) at a quantity (Q3) which is equal to the total number of music users.

The Marginal Revenue Curve represents the additional revenue received by ASCAP or BMI from the issuance of the last additional blanket license.¹⁶⁹ The Marginal Revenue Curve slopes downward and to the right, because, as the Demand Curve indicates, in order to sell more blanket licenses, ASCAP and BMI must reduce the price they charge for all; and thus, as more are sold, the additional (or “marginal”) revenue received from the sale of each additional license decreases as well.¹⁷⁰ The Marginal Revenue Curve always is exactly twice as steep as the Demand Curve.¹⁷¹

Three Marginal Cost Curves are shown in Figure 1, each depicting an alternate assumption concerning ASCAP's and BMI's marginal costs. Marginal cost is the additional cost of producing one more of whatever a business sells.¹⁷² The Marginal Cost Curve for most things is U-shaped. That is, it falls at first as additional units are produced, but eventually it rises indicating that the additional cost of producing an additional unit increases as the number of units produced increases.¹⁷³ The Marginal Cost Curves shown in Figure 1 are flat and do not rise above zero. The reason for this is that it costs ASCAP and BMI nothing to issue an additional blanket license, because music can be performed by any number of people without leaving less for others to perform. Therefore, when ASCAP and BMI issue blanket licenses, they do not have to produce (or acquire) more music in order to issue additional blanket licenses. ASCAP and BMI can and do issue many blanket licenses to the very same music. And no one is the worse off for it.

One of the Marginal Cost Curves shown in Figure 1 (MC1) depicts a marginal cost of zero. Previously, those who have thought about AS-

168. P. Samuelson, *supra* note 159, at 53-55; L. Sullivan, *supra* note 159, at 798; E. Gellhorn, *supra* note 160, at 45.

169. P. Samuelson, *supra* note 159, at 464-67.

170. P. Samuelson, *supra* note 159, at 466; E. Gellhorn, *supra* note 160, at 61.

171. P. Samuelson, *supra* note 159, at 466-67; E. Gellhorn, *supra* note 160, at 61 n.13.

172. P. Samuelson, *supra* note 159, at 428.

173. *Id.*

CAP's and BMI's marginal costs have concluded that they are zero.¹⁷⁴ It appears, however, that ASCAP's and BMI's marginal costs actually are *negative*, because each time they issue an additional blanket license, a potential copyright infringer is eliminated, and thus their copyright enforcement expenses are reduced. If, for example, every music user took a blanket license, ASCAP and BMI would have no copyright enforcement expenses at all. For this reason, Figure 1 also depicts two negative Marginal Cost Curves (MC2 and MC3). They are alternatives to one another. Each depicts an amount of additional savings achieved from the issuance of an additional blanket license. (MC3 depicts greater marginal savings than MC2.) Figure 1 assumes that copyright enforcement costs are uniform for each potential infringer; and thus, the marginal savings achieved from the issuance of additional blanket licenses are shown as uniform as well. In real life, ASCAP's and BMI's marginal savings may not be uniform. However, these savings always will be depicted by a negative Marginal Cost Curve, and that is the key point for the analysis that follows. Whether that curve is flat, sloped or curved does not affect the conclusions to be drawn from that analysis.

1. The Economics of Licensing Numerous, Unorganized Music Users

ASCAP and BMI issue blanket licenses to music users who are engaged in a wide variety of businesses. Some of ASCAP's and BMI's customers have organized themselves into industry-wide associations for the purpose of bargaining with ASCAP and BMI. Others have not done so however, even though there are many of them in the same business and even though they are enough alike that ASCAP and BMI issue identical licenses containing uniform fee schedules to all of them. There are, for example, thousands of nightclubs in which music is performed, and which therefore need performance licenses. Although hotels negotiate with ASCAP and BMI through a hotel industry trade association, nightclubs do not.¹⁷⁵ Given the great number of nightclubs, their competition with one another (at least within geographic markets), their relatively small size, and their lack of organization, it might be expected that ASCAP and BMI would wield monopoly power over nightclubs, and in doing so, would limit output and charge higher than competitive prices. In fact, ASCAP and BMI do not. Figure 1 indicates why not.

174. *BMI v. Moor-Law, Inc.*, *supra* note 16, at 763; *Cirace*, *supra* note 12, at 282.

175. *BMI v. Moor-Law, Inc.*, *supra* note 16, at 761.

According to economic theory, a monopolist maximizes its profit by expanding its output until its marginal costs equal its marginal revenue and then pricing its product at whatever amount its customers' demand curve indicates is necessary to sell the quantity produced.¹⁷⁶ Profit is maximized in this fashion, because so long as marginal revenue (the amount earned from the sale of an additional unit) exceeds marginal cost (the cost of producing an additional unit), there is profit to be made from producing and selling an additional unit. Once marginal costs exceed marginal revenue, however, additional production and sale results in a marginal loss. The profit-maximizing monopolist expands output and sales so long as it is marginally profitable to do so, but quits when further expansion results in a marginal loss.

Therefore, according to economic theory, if ASCAP's and BMI's marginal costs were zero, their marginal costs would equal their marginal revenues at quantity Q1, and that is the number of blanket licenses they would issue at price P1 per license. In a perfectly competitive market, the supply of music (i.e., its marginal cost) would equal the nightclubs' demand for music at quantity Q3 and price P3. Thus, it appears at first that ASCAP and BMI would exert monopoly power over nightclubs by limiting the number of blanket licenses issued (Q1 is less than Q3) and by charging a higher than competitive price (P1 is higher than P3).

Initial appearances are deceiving however. Note that if ASCAP and BMI issue only Q1 licenses, several music users (Q3 minus Q1) will be left without blanket licenses. ASCAP and BMI cannot be indifferent to this, because as long as some music users do not have licenses, ASCAP and BMI will have to spend money on copyright enforcement to be certain that those who do not have licenses do not take a "free ride" by using music without paying for it. This is why ASCAP's and BMI's marginal costs actually are negative. If their true marginal cost curve is represented by MC2, marginal cost equals marginal revenue at quantity Q2, at which point the price for each blanket license will be P2. If their true marginal cost curve is represented by MC3, marginal cost equals marginal revenue at quantity Q3, at which point (theoretically) the price for each blanket license will be P3. In other words, ASCAP's and BMI's ability to charge higher-than-competitive licensing fees is directly inhibited by its copyright enforcement costs; and if those costs become great enough, the result is precisely the same as it would be under perfectly competitive conditions.

176. E. Gellhorn, *supra* note 160, at 63; L. Sullivan, *supra* note 159, at 805; P. Samuelson, *supra* note 159, at 467.

The dampening effect that copyright enforcement costs have on the licensing fees charged by ASCAP and BMI is more than mere economic theory. In *Broadcast Music, Inc. v. Moor-Law, Inc.*, the District Court found, as an observed fact, that,

[w]hile normal competitive forces do not operate in this market, it is not true that BMI's price for its [nightclub] license is unconstrained. Testimony at trial convinced me that the free rider problem does provide a significant constraint on the price BMI charges. The higher the price it charges, the greater the resistance of [nightclub] users is likely to be, and, conversely, the lower the price, the lower the resistance will be. Since the free rider problem tends to make BMI's enforcement costs high and can, indeed, cause increased costs to more than consume increased revenue from a higher price, BMI considers this problem when setting a price.¹⁷⁷

2. The Economics of Licensing Organized Music Users

Several kinds of music users — including radio and television stations, and hotels and motels — have organized themselves into industry-wide trade associations for the purpose of bargaining collectively with ASCAP and BMI.¹⁷⁸ Collective bargaining by buyers tends to offset whatever monopolistic bargaining power sellers otherwise might have had.¹⁷⁹ This tendency is known as the "concept of countervailing power."¹⁸⁰ In effect, collective bargaining by buyers creates a "bilateral monopoly" in which neither side is able to dominate the other; and the outcome of negotiations will approximate (though not necessarily duplicate) those expected in a competitive market.¹⁸¹

In the music business in particular, collective bargaining by hotels and motels was viewed by the court in *BMI v. Moor-Law* as a "remedy" for what it considered to be the absence of price competition among composers and publishers.¹⁸² In *Buffalo Broadcasting* the court also appears to have recognized that the All-Industry Committee enjoyed at least some measure of countervailing power, because the court found that in earlier years, local stations had agreed to blanket licenses

177. *BMI v. Moor-Law, Inc.*, *supra* note 16, at 764.

178. *Id.* at 761; *Buffalo Broadcasting v. ASCAP*, *supra* note 31, at 288.

179. *BMI v. Moor-Law, Inc.*, *supra* note 16, at 772; *Cirace*, *supra* note 12, at 284.

180. J.K. Galbraith, *American Capitalism: The Concept of Countervailing Power* (1952); F.M. Scherer, *Industrial Market Structure and Economic Performance* 306 (2d ed. 1980).

181. J. Bain, *supra* note 145, at 152.

182. *BMI v. Moor-Law, Inc.*, *supra* note 16, at 772.

as a necessary "compromise."¹⁸³ The court did not explain what the compromise had involved. Conceivably, the court meant that local stations had agreed to blanket licenses in order to get licenses at all; but this seems unlikely. The license fees received by ASCAP and BMI from local stations are so major a portion of ASCAP's and BMI's total revenues, that ASCAP and BMI hardly could afford to withhold licenses from local stations altogether. (In 1980, for example, BMI's total revenues were approximately \$90 million.¹⁸⁴ More than \$20 million of the total, or more than 22%, came from local television stations. In fact, revenues from local stations were more than two-and-a-half times as great as the \$7.8 million BMI collected from the networks that year.¹⁸⁵) Therefore, the compromise referred to in *Buffalo Broadcasting* must have been that local stations agreed to accept blanket licenses in exchange for ASCAP's and BMI's agreement to accept lesser blanket fees.

The bilateral monopoly effects of collective bargaining by music users are portrayed in Figure 1. If ASCAP's and BMI's copyright enforcement costs were insignificant, so that their marginal costs were zero, the music users' countervailing power alone would tend to reduce the price of blanket licenses below P1 (to perhaps as low as P3) and increase the quantity of licenses issued above Q1 (to perhaps as great as Q3). ASCAP's and BMI's copyright enforcement costs are not insignificant, however; and therefore their marginal costs are not zero, they are negative. This being so, the savings that ASCAP and BMI can achieve by issuing more blanket licenses gives music users additional power on top of the power they realize from collective bargaining. And thus it appears that the balance of bargaining power rests with organized music users, not with ASCAP and BMI, even though ASCAP and BMI are "monopolies" in the non-technical sense of that word.

3. The Economic Impact of the ASCAP Consent Decree

The 1950 amendment to the ASCAP Consent Decree added a provision which further restricts whatever monopoly bargaining power ASCAP otherwise might have had. The provision permits music users to apply to the Federal District Court in New York City for an order determining a "reasonable" license fee, if agreement on such fees is not reached with ASCAP directly.¹⁸⁶ In *K-91, Inc. v. Gershwin Publishing*

183. *Buffalo Broadcasting v. ASCAP*, *supra* note 31, at 288.

184. *BMI v. Moor-Law, Inc.*, *supra* note 16, at 761.

185. *Buffalo Broadcasting v. ASCAP*, *supra* note 31, at 282 n.19.

186. *US v. ASCAP*, *supra* note 24, at 63,754.

Corp., the Ninth Circuit Court of Appeals concluded that because of this provision of the Consent Decree, "ASCAP cannot be accused of fixing prices because . . . it is not the price fixing authority."¹⁸⁷ Years later, in *CBS v. ASCAP*, the network sought to avoid the *K-91* ruling on this issue by arguing that "a 'reasonable' price fixed by a judge under the decree, however objectively determined, is not the equivalent of a price determined in the market place."¹⁸⁸ The Court of Appeals was persuaded by this argument. In its first decision, the Court of Appeals concluded that "a price fixed by a judge, no matter what his personal competence, is not a true reflection of competitive market forces. The price, no matter how reasonable, if determined on the imprimatur of a court, remains the product of non-competitive forces."¹⁸⁹ There is a flaw in this reasoning, however. The flaw is that due to the unique nature of music, the price for performance rights can never be a "true reflection of competitive market forces." Such forces do not work normally in the music industry.¹⁹⁰

In any event, although the Consent Decree does not provide a mechanism for judicial determination of a truly competitive price, the Consent Decree does significantly enhance the countervailing power of music users in their negotiations with ASCAP. It may be expensive for music users to resort to court for a determination of a reasonable fee, but it is equally expensive for ASCAP. Furthermore other aspects of the proceeding favor music users. For example, the Consent Decree imposes the burden on ASCAP of proving that the fee it has requested is reasonable.¹⁹¹ While the proceeding is pending, music users are entitled to a license at a judicially fixed interim fee.¹⁹² And once a reasonable fee is fixed, ASCAP is required to offer licenses at a comparable fee to all other similarly situated music users.¹⁹³ (The BMI Consent Decree does not contain a similar provision for the judicial determination of reasonable fees.¹⁹⁴ Nevertheless, historically, BMI's and ASCAP's fees have been proportional to one another.¹⁹⁵ And thus the judicial determination of an ASCAP fee would be likely to have an effect on BMI's fees as well.)

187. 372 F.2d at 4.

188. 337 F. Supp. at 397 n.2.

189. 562 F.2d at 139.

190. See *supra* text accompanying notes 159-166.

191. *US v. ASCAP*, *supra* note 24, at 63,754.

192. *Id.*

193. *Id.*

194. *US v. BMI*, *supra* note 25.

195. *CBS v. ASCAP*, *supra* note 8, at 753.

4. Conclusion

Because copyright enforcement expenses necessarily influence the setting of license fees, because music users who bargain collectively enjoy countervailing power, and because music users can ask the court to determine a "reasonable" fee if agreement is not reached, ASCAP and BMI are unable to exercise whatever monopoly power they otherwise might have had. Indeed, it appears likely that the balance of bargaining power actually favors music users in their negotiations over blanket license fees.

C. *The Economics of Per Composition Licensing*

The Supreme Court has recognized that a blanket license is a distinct product from licenses to perform individual musical compositions.¹⁹⁶ For this reason, the Supreme Court has said that blanket licensing does not violate the antitrust laws merely because blanket license fees do not vary with the amount, quality or value of the music actually used.¹⁹⁷ Nevertheless, it may be argued that an economic analysis of blanket licensing does not respond to music users' complaints that they would prefer not to have to take blanket licenses. Therefore, the argument might proceed, Figure 1's demand curve for blanket licenses plots music users' willingness to buy something they would not buy at all if they could buy what they do want, namely, individual, per composition (or per use) licenses. Thus, it may be argued that in order to assess the true economic consequences of blanket licensing, the economics of *per composition* licensing must be considered and compared to those of blanket licensing. Figure 2 does so.

The vertical axis of Figure 2 measures the Price per composition for a license to perform musical compositions. The horizontal axis measures the number of compositions for which licenses are issued. The Normal Demand Curve for per composition licenses slopes downward and to the right, indicating that as the price per composition decreases, music users will take licenses to more compositions. The Marginal Revenue Curve represents the additional revenue received from the issuance of a license for one additional composition, assuming the total number of compositions for which licenses are issued is indicated by the horizontal axis and that the price per composition is indicated by the vertical axis. The Marginal Revenue Curve slopes

196. *BMI v. CBS*, *supra* note 7, at 21-22.

197. *Id.*

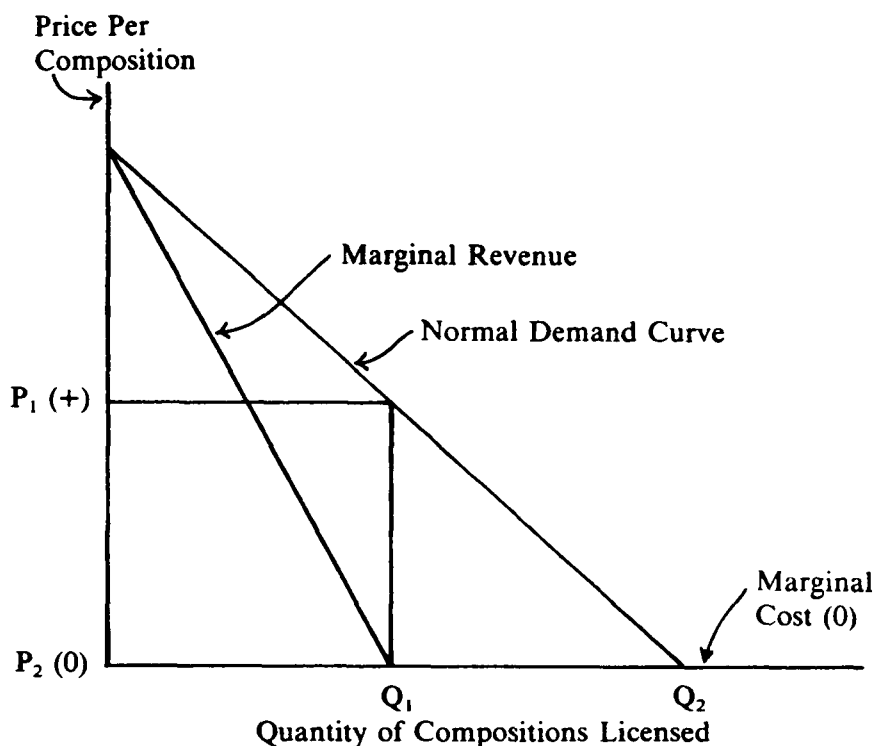


Figure 2

downward and to the right, because in order to sell more licenses for more compositions, the price charged for all must be reduced; and thus, as more are sold, the additional (or "marginal") revenue received from the sale of each additional per composition license decreases.¹⁹⁸

The Marginal Cost Curve in Figure 2 is shown to be zero at all quantities, because it costs nothing to issue an additional license to perform existing music.¹⁹⁹ (Where per composition — as distinguished from blanket — licenses are concerned, marginal costs are not negative. Nothing is saved by issuing an additional per composition license, because copyright monitoring and enforcement expenses remain the same unless licenses for all available compositions are taken. That is, if a music user licenses only some of the songs in a repertoire, that user must be monitored to be certain it does not use any unlicensed songs;

198. The economic characteristics of Figure 2's Normal Demand Curve for per composition licenses and Marginal Revenue Curve are the same as the characteristics of Figure 1's Demand Curve and Marginal Revenue Curve discussed in the text accompanying notes 168 through 171, *supra*.

199. See *supra* authorities cited in note 174.

and the cost of doing that monitoring will be no less than if that user had no license at all.²⁰⁰)

If ASCAP and BMI (or any other organization) were to be the exclusive issuer of per composition licenses, and if music users were to bargain separately and thus have no countervailing power, ASCAP and BMI would maximize profits by issuing licenses to Q1 compositions, because at this quantity Marginal Revenue is equal to Marginal Cost.²⁰¹ If Q1 were the quantity of per composition licenses issued, the Normal Demand Curve indicates that music users would pay Price P1 to license each composition. At the other extreme, if music users were to have monopsony power (as do the networks, and as do those users who bargain collectively), and if individual composers and publishers were to compete with one another when issuing per composition licenses, music users would be able to induce the issuance of Q2 licenses, because at this quantity, Normal Demand is equal to Marginal Cost.²⁰² At quantity Q2, Price would be P2 (which theoretically would be zero).

In effect, a *blanket* license is one which requires music users to take licenses for *all* of the songs in a repertory. It therefore has been described by Professor John Cirace as an "all-or-nothing bargain,"²⁰³ because music users who take a blanket license get a license for all songs while those who do not get nothing. According to Professor Cirace, the "all-or-nothing" nature of blanket licensing enables ASCAP and BMI to select both the quantity of compositions for which licenses are issued and the price charged for each composition, even though music users have substantial monopsony power themselves.²⁰⁴ The reason Cirace contends that blanket licensing gives ASCAP and BMI this tremendous power is illustrated in Figure 3.

Figure 3 is identical to Figure 2 except that two additional demand curves are portrayed — All-or-Nothing Demand Curves #1 and #2. The *Normal* Demand Curve plots the amount that music users would be willing to pay for a license for each composition *assuming* they could buy licenses for any number of fewer compositions at a higher price per composition.²⁰⁵ An *All-or-Nothing* Demand Curve measures

200. BMI v. Moor-Law, Inc., *supra* note 16, at 768.

201. See *supra* text accompanying note 176; Cirace, *supra* note 12, at 283.

202. Cirace, *supra* note 12, at 283-84.

203. *Id.* at 285.

204. *Id.*

205. M. Friedman, *Price Theory* 15 (2d ed. 1976).

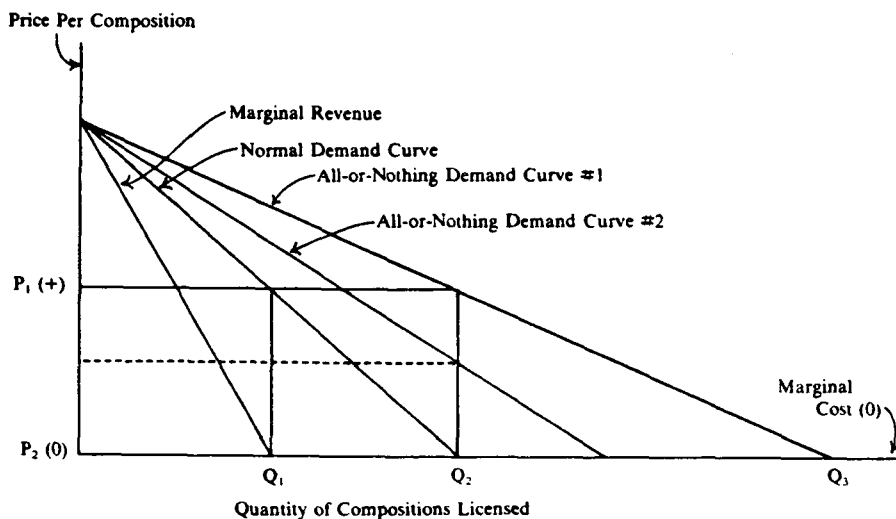


Figure 3

something else entirely: it plots the amount music users would be willing to pay per composition *assuming* they could *not* buy licenses for fewer compositions — that is, assuming that unless they buy licenses for all the songs in the repertory, they would be unable to obtain licenses for any.²⁰⁶

Cirace has concluded that the all-or-nothing nature of blanket licensing requires music users to buy more music than they want at a price that is greater than they want to pay. In fact, he says, the blanket license enables ASCAP and BMI to charge the monopoly price per composition (P_1) for the number of compositions that would have been issued (Q_2) if music users had all of the bargaining power and ASCAP and BMI none.²⁰⁷ It appears, however, that Professor Cirace overstates the effects of blanket licensing on ASCAP's and BMI's bargaining power. This is so for two reasons.

First, the amount that music users are willing to pay for blanket licenses determines the position of the All-or-Nothing Demand Curve. The All-or-Nothing Demand Curve shifts farther to the right the more music users are willing to pay. All-or-Nothing Demand Curve #1 in Figure 3 is positioned precisely where Cirace positioned it in his analysis.²⁰⁸ This position, however, is as far to the right as an All-or-Nothing Demand Curve ever gets. And it gets this far to the right only when

206. *Id.*

207. Cirace, *supra* note 12, at 285-86.

208. *Id.* at 285, Figure 2.

the total amount spent by buyers for the product in question is so small that the marginal utility of the last dollars spent for it is not affected.²⁰⁹ This happens only when its cost is so small in relation to the total cost of the thing in which the product is to be used that the demand for the product is inelastic.²¹⁰ For example, a gourmet restaurant's demand for salt is inelastic, because its cost is very small in relation to the total cost of everything that goes into operating a gourmet restaurant.²¹¹ However, if the total amount spent for the product is great enough that marginal utility is affected, then the All-or-Nothing Demand Curve does not shift as far to the right.²¹² It may shift only as far as All-or-Nothing Demand Curve #2. This is critical, because the price increases as the All-or-Nothing Demand Curve shifts to the right; and the less it shifts, the less the price increases.

In the music business, this means that the demand for blanket licenses is reflected by All-or-Nothing Demand Curve #1 only if the price of blanket licenses is so small in relation to the cost of the production in which the music is used that the marginal utility of the money spent on blanket licenses is not affected and the demand for blanket licenses is inelastic. If the price of blanket licenses is great enough to affect marginal utility and the elasticity of demand, then the demand curve for blanket licenses is not as far to the right as All-or-Nothing Demand Curve #1. If the demand curve for blanket licenses is only as far to the right as All-or-Nothing Demand Curve #2, the price of Q2 compositions will be less than P1. If the cost of blanket licenses is great enough in relation to the total cost of the production in which the music is used, the All-or-Nothing Demand Curve would coincide with the Normal Demand Curve. In that instance, music users would be indifferent between blanket and per composition licenses.

The second and even more significant reason Cirace overstates the effect of blanket licensing on ASCAP's and BMI's bargaining power is that he apparently concluded that blanket licensing deprives monopoly buyers of their bargaining power to reduce prices. In his analysis, a blanket license seems to consist of the right to perform Q2 compositions. If blanket licenses did consist of Q2 compositions, then the price per composition would increase as the demand curve shifted to the right, as Cirace indicated.²¹³ However, although the all-or-nothing

209. M. Friedman, *supra* note 205, at 15 n.1.

210. Cirace, *supra* note 12, at 285 n.50; P. Samuelson, *supra* note 159, at 411.

211. P. Samuelson, *supra* note 159, at 411.

212. M. Friedman, *supra* note 205, at 15 n.1.

213. Cirace, *supra* note 12, at 285, Figure 2.

character of blanket licensing may shift the demand curve for music to the right, it does not deprive monopsony buyers of their bargaining power to reduce the price towards the competitive price P_2 . The reason that it does not is that there is no reason to assume that there are Q_2 compositions in ASCAP's and BMI's repertoires. There are more than three million compositions in the ASCAP repertory and approximately one million in BMI's.²¹⁴ Music users contend that they neither want nor need licenses to this many compositions;²¹⁵ indeed, NBC once said that it would be satisfied with licenses to 2,217 compositions.²¹⁶ It therefore appears that Q_2 compositions is far fewer than the number in a blanket license. It is likely that the number of compositions in a blanket license is closer to Q_3 (and maybe even greater than that). For this reason, monopsony buyers have the bargaining power to obtain blanket license fees of less than P_1 . If there are Q_3 compositions in a blanket license, buyers even have the power to bargain the price down to P_2 .

For both of these reasons, blanket licensing does not give ASCAP and BMI the bargaining power to set monopoly prices when they deal with monopsony buyers including the networks and local television stations.

VII. THE ECONOMIC CASE FOR RETAINING BLANKET LICENSING

There are at least four economic reasons for retaining the use of blanket licensing.

First, blanket licensing is the only means (short of unionization) composers have to offset the monopsony buying power of networks and local television stations. Professor Cirace himself found this to be so (at least in the case of network television).²¹⁷ In fact, he concluded that "[n]o system short of blanket licensing will adequately offset the monopsony power of network television"²¹⁸ (and presumably other monopsony buyers as well).

Second, per composition licenses would result in greater transaction costs than are incurred with blanket licenses. It is the case that *synchronization* licenses are issued on a per composition basis,²¹⁹ and

214. *Buffalo Broadcasting v. ASCAP*, *supra* note 31, at 277.

215. *See, e.g., BMI v. Moor-Law, Inc.*, *supra* note 16, at 767.

216. *US v. ASCAP* (Application of National Broadcasting Co., Inc.), *supra* note 70, at 90,008.

217. Cirace, *supra* note 12, at 293.

218. *Id.* at 297.

219. *See supra* text accompanying notes 48 through 50.

therefore the *number* of transactions would not increase if performance licenses were issued at the same time as synch licenses. However, at the present time, synch license transactions involve very little money. Synch rights for a television program may sell for only \$50 to \$500 per composition, as compared to synch-and-performance rights for theatrical motion pictures which cost \$750 to \$20,000 per composition.²²⁰ Composers and publishers treat television synch licenses as "loss leaders" in order to induce producers to use their compositions, because more and greater earnings follow in the form of performance fees paid by the networks and local stations to ASCAP and BMI. However, if performance fees were no longer collected by ASCAP and BMI, but rather were agreed to at the outset when synch licenses are issued, those initial negotiations would take on a financial significance they do not have at present. Thus, it may be expected that much more time and effort — and thus expense — would go into those negotiations.

Third, per composition licensing would result in substantially greater copyright enforcement costs. At the present time, monitoring and enforcement is done by ASCAP and BMI, and they deduct the costs of doing so prior to distributing the balance among composers and publishers.²²¹ Monitoring and enforcement by individual composers and publishers would be much more expensive,²²² because all of the economies of scale now realized by ASCAP and BMI would be lost. The Justice Department itself has recognized that it would be "impossible" for composers and publishers to enforce their rights under the Copyright Act on an individual basis.²²³ Furthermore, monitoring and enforcement expenses would increase even if composers and publishers hired ASCAP and BMI to perform monitoring and enforcement services centrally. This is so because blanket licensing eliminates the need to monitor licensees. If per composition licenses were used, however, all music users would have to be monitored to be certain that they do not use compositions for which they do not have licenses.²²⁴ Computer technology would be of little or no help in monitoring, even if done centrally, because many songs have identical titles. For example, BMI has more than 30 songs in its repertory entitled "Rose Colored Glasses"; but in 1981, the most popular song with that title was in the ASCAP repertory. Thus in order to monitor local television stations by

220. *Buffalo Broadcasting v. ASCAP*, *supra* note 31, at 283 n.20; *Cirace*, *supra* note 12, at 295 n.114.

221. *BMI v. Moor-Law, Inc.*, *supra* note 16, at 761-62.

222. *BMI v. CBS*, *supra* note 7, at 20.

223. *See supra* note 7.

224. *BMI v. Moor-Law, Inc.*, *supra* note 16, at 768 n.13, 770.

checking computerized editions of *TV Guide* against cue sheets and lists of BMI and ASCAP songs, it would be necessary to have cue sheets which accurately list composers' names as well as song titles.²²⁵

Finally, per composition licensing is not necessary to assure competition among composers and publishers, because blanket licensing does not eliminate all such competition. Although composers and publishers of pre-existing music do not price compete in the licensing of performance rights, they do compete in promoting their music.²²⁶ Even with respect to price, blanket licensing does not "insulate" composers and publishers from competition among themselves. They price compete when issuing synchronization licenses. Moreover, television producers are able to price compete among themselves when setting license fees for their programs as a whole; and thus, to the extent music publishers are owned by producers, publishers compete among themselves as well.

VIII. THE ROLE OF ECONOMIC THEORY IN THE INTERPRETATION OF THE ANTITRUST LAWS

Antitrust law is designed to control the exercise of private economic power.²²⁷ It is therefore not surprising that an understanding of antitrust law requires "an appreciation of the structure of the American economy and some acquaintance with economic theory."²²⁸ There are those who have endorsed economics as a unifying theory for much more than antitrust law.²²⁹ However, it may be wise to remain skeptical of the value of the "dismal science" even in the proper interpretation of antitrust.

The use of economics in the solution of legal problems presents several problems. As Professor Phillip Areeda has pointed out, "economics . . . provides few clear-cut answers. We are not always able to determine the economic results of the particular practice or market structure under examination. Nor can we always predict the consequences of prohibiting some particular behavior."²³⁰ In addition, there is another factor which "limits the utility of economics"²³¹ in the interpretation of law, namely, the uneven capacity of the bench and bar to

225. *Id.* at 770.

226. *CBS v. ASCAP*, *supra* note 8, at 770.

227. E. Gellhorn, *supra* note 160, at 1; P. Areeda, *Antitrust Analysis* 5 (3d ed. 1981).

228. P. Areeda, *supra* note 227, at 6.

229. *See, e.g.*, R. Posner, *Economic Analysis of Law* (2d ed. 1977); A.M. Polinsky, *An Introduction to Law and Economics* (1983).

230. P. Areeda, *supra* note 227, at 6.

231. L. Sullivan, *supra* note 159, at 7.

evaluate economic data and properly manipulate economic theory.²³² Judges and lawyers are trained to administer rules of law. Predictability is an important value in the administration of justice. Indeed, at a recent workshop on the role of economic theory in antitrust enforcement, Federal Circuit Judge Stephen Breyer said that "law is aimed at justice, not truth."²³³ If every judge were free to apply his or her own economic views, it would be impossible for business executives to know in advance whether contemplated conduct is legal or apt to result in treble damage judgments.

The *Buffalo Broadcasting*²³⁴ case seems to illustrate perfectly the unpredictability that results when economic theory, rather than legal doctrine, becomes the basis for decision. Is there a rule of *law* that permits blanket licensing of television networks and locally produced programming (as well as radio stations, nightclubs, and hotels) but makes blanket licensing of syndicated television programming (including off-network reruns) an illegal restraint of trade? Even if the District Court's economic analysis in *Buffalo Broadcasting* were correct, the case makes an overly fine distinction — a distinction which could not have been predicted. Indeed, in the *CBS* case, the Supreme Court itself noted that "the necessity for and advantages of a blanket license for [television networks] may be far less obvious than is the case when the potential users are individual television . . . stations."²³⁵ Thus in *Buffalo Broadcasting*, the court relied on economic analysis to conclude that blanket licensing is illegal in an area — local television — where the need for and advantages of blanket licensing are more obvious than they are in another area — network television — where blanket licensing is legal. When economic analysis leads to a conclusion such as this, the analysis has little if any value.

232. See L. Sullivan, *supra* note 159, at 7.

233. Lewin, *What's the Role of Economic Theory in Antitrust Rulings?*, L.A. Daily J., March 11, 1983, at Sec. 1, p.4.

234. *Buffalo Broadcasting Company, Inc. v. ASCAP*, *supra* note 31.

235. *BMI v. CBS*, *supra* note 7, at 21.